Supreme Court, U.S.
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87-1504

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD O. LOENGARD, JR., JOHN BORG LOENGARD and URSULA L. BERENS, individually and as Executors of the ESTATE OF MARGERY BORG LOENGARD, Deceased; THE BANK OF NEW YORK, Trustee of the Trust for the Benefit of DOROTHY BORG under the Will of SIDNEY C. BORG, Deceased; FRANCES M. BORG, DONALD C. BORG and WILLIAM FURTH as Executors of the ESTATE OF JOHN S. BORG, Deceased; and SYLVIA T. YARROW,
Petitioners,

v.

SANTA FE INDUSTRIES, INC.,
SANTA FE NATURAL RESOURCES, and
KIRBY LUMBER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY BENDER *
JANINE L. BENDER
SYMA S. LEVINE
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

* Counsel of Record

Attorneys for Petitioners

March 10, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Is there an unconstitutional taking of property without just compensation in violation of the Fifth and Fourteenth Amendments of the Constitution where the United States Court of Appeals for the Second Circuit applied Delaware law to authorize majority shareholders to freeze-out the minority and pay them only *one third* of the cash value of their shares or to seek an appraisal which authorized an award of only a fraction of fair compensation?

2. Did not the United States Court of Appeals for the Second Circuit egregiously fail to apply properly the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and deny petitioners due process of law when it decided a question of Delaware law in a manner directly in conflict with the way the Delaware courts would have decided that issue, where the same panel of the Second Circuit ignored its previous findings that the transaction at issue operated as a fraud on the minority shareholders and, in reversal of its previous position, held that Delaware would find no breach of fiduciary duty and would offer no relief for conduct which was "cognizable . . . 'as a fraud' "?

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OCTOBER TERM, 1987

No. ——

RICHARD O. LOENGARD, JR., JOHN BORG LOENGARD and URSULA L. BERENS, individually and as Executors of the ESTATE OF MARGERY BORG LOENGARD, Deceased; THE BANK OF NEW YORK, Trustee of the Trust for the Benefit of DOROTHY BORG under the Will of SIDNEY C. BORG, Deceased; FRANCES M. BORG, DONALD C. BORG and WILLIAM FURTH as Executors of the ESTATE OF JOHN S. BORG, Deceased; and SYLVIA T. YARROW,
Petitioners,

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SANTA FE INDUSTRIES, INC.,
SANTA FE NATURAL RESOURCES, and
KIRBY LUMBER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Loengard et al. ("Loengard") hereby petition for a writ of certiorari to review the November 12, 1987 judgment order of the United States Court of Appeals for the Second Circuit in this case (1a).[1]

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[1] Citations to the Appendix at the rear of this petition are designated by the page number followed by the letter "a." Emphasis added unless otherwise noted.

OPINIONS BELOW

The November 12, 1987 and January 28, 1987 orders of the United States Court of Appeals for the Second Circuit are not reported but are reproduced respectively at the rear of this petition (1a, 4a).[1] The opinions of the district court are reported: *Loengard v. Santa Fe Industries, Inc.*, 573 F. Supp. 1355 (S.D.N.Y. 1983) and *Loengard v. Santa Fe Industries, Inc.*, 639 F. Supp. 673 (S.D.N.Y. 1986) and are reproduced at the rear (19a, 11a).

JURISDICTION

The order of the Second Circuit was entered on November 12, 1987. On February 3, 1988, Justice Marshall extended the time for filing this petition to and including March 10, 1988. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1) (1948).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law.

The Delaware short-form merger statute, Del. Code Ann. tit. 8, sec. 253 (1981), provides in pertinent part:

> (a) In any case in which at least 90% of the outstanding shares of each class of the stock of a corporation or corporations is owned by another corporation and 1 of the corporations is a corporation

of this State and the other or others are corporations of this State, or any other state or states, or the District of Columbia and the laws of the other state or states, or the District permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction, the corporation having such stock ownership may either merge the other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such other corporations, into 1 of the other corporations by executing, acknowledging and filing, in accordance with sec. 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation. . . .

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the stockholders of the subsidiary Delaware corporation party to the merger shall have appraisal rights as set forth in sec. 262 of this title.

The Delaware appraisal statute, Del. Code Ann. tit. 8, sec. 262 (1981), provides in pertinent part:

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of their value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon

the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding.

STATEMENT OF THE CASE

This petition arises from a diversity case in the United States District Court for the Southern District of New York (Duffy, J.). Petitioners, a group of former stockholders in Kirby Lumber Corporation ("Kirby"), a subsidiary of Santa Fe Industries, Inc., were cashed out in a Delaware short-form merger and paid $150 per share. In a subsequent appraisal proceeding in Delaware, whose findings the respondents are collaterally estopped from challenging, the Delaware Supreme Court determined Kirby's asset value to be $456 per share on the date of the merger and the fair market value of each Kirby share to be $254.40. *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 139-140 (Del. 1980). Plaintiffs were not a party to that appraisal proceeding. The Second Circuit has summarized the facts as follows (7a-8a):

> Plaintiff New York residents were stockholders in Kirby Lumber Corporation ("Kirby"), a Delaware corporation controlled by defendant Santa Fe Industries, Inc., and by the latter's wholly-owned subsidiary, defendant Santa Fe Natural Resources, Inc. (together "Santa Fe"). Santa Fe Natural Resources, Inc., owned 95% of Kirby's stock. To freeze out plaintiffs and other minority shareholders of Kirby, Santa Fe organized Forest Products, Inc. ("Forest"), another wholly-owned subsidiary, and in a short-form merger under Del. Code Ann. tit. 8, sec. 253 (1983), merged Forest into Kirby on July 31, 1974. The next day minority shareholders were informed of their right either to receive $150 cash per share or to seek an appraisal under Delaware law. Plaintiffs accepted the $150. Other stockholders who sought an appraisal received an appraised value of

$254.40 (plus prejudgment interest). *See Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 139-140 (Del. 1980). Unsuccessful efforts were made by and on behalf of plaintiffs herein to be included in a class action in *Green v. Santa Fe Industries, Inc.*, 391 F. Supp. 849 (S.D.N.Y. 1975), *aff'd in part and rev'd in part*, 533 F.2d 1283 (2d Cir. 1976), *rev'd*, 430 U.S. 462 (1977), *on remand*, *Green v. Santa Fe Industries, Inc.*, 562 F.2d 4 (2d Cir. 1977), 82 F.R.D. 688 (S.D.N.Y. 1979), 88 F.R.D. 575 (S.D.N.Y. 1980), 576 F. Supp. 269 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984). On November 29, 1982, plaintiffs filed this diversity action in federal court, alleging fraudulent conduct under the Martin Act, N.Y. Gen. Bus. Law § 339-a (McKinney 1968) and § 352(c) (McKinney 1984), and breach of fiduciary duty. This suit was brought within six but not within three years of the merger date, July 31, 1974, after taking into account the tolling of the statute of limitations from September 10, 1974 (when the *Green* case was brought) until June 7, 1979 (when class action status was denied). The district court found the breach of fiduciary action to be governed by a three-year statute of limitations, N.Y. Civ. Prac. Law § 214(4) (McKinney Supp. 1987), and hence time-barred. It found the Martin Act claim to be governed by a six-year limitations period, N.Y. Civ. Prac. Law § 213(1) (McKinney Supp. 1987), and hence timely. *Loengard v. Santa Fe Industries, Inc.*, 575 F. Supp. 1355 (S.D.N.Y. 1983). The district court later found, however, that no Martin Act claim was stated. *Loengard v. Santa Fe Industries, Inc.*, 639 F. Supp. 673 (S.D.N.Y. 1986).

Judge Duffy found that no claim was stated under New York's Martin Act stating that there was no "fraudulent conduct" on the part of the respondents in connection with the merger. On appeal to the Second Circuit, petitioners made a motion to certify the statute of limitations question and the Martin Act claim to the

New York Court of Appeals which had just recently granted other minority shareholders of Kirby—"the Borg plaintiffs"—leave to appeal in a case arising out of the same merger involved here. *Green and Borg v. Santa Fe Industries, Inc.*, 70 N.Y.2d 244 (1987). The Second Circuit granted the motion by its certification order of January 28, 1987. In that order, the Second Circuit criticized Judge Duffy's holding of "no fraudulent conduct" as follows (5a):

> The district court so found despite the fact that the Martin Act speaks in terms of "fraud" and "deception, concealment, suppression . . . ." N.Y. Gen. Bus. Law sec. 352-c, and despite this court's holding in *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283, 1290 (2d Cir. 1976), that the conduct at issue in this case was "cognizable as 'an act, practice or course of business which operates or would operate as a fraud.'" This aspect of our opinion in *Green* was not affected by the decision of the United States Supreme Court, 430 U.S. 462 (1977), which reversed *Green* on the basis that "fraud" was not covered by section 10(b) of the Securities Exchange Act of 1934, that section reaching only conduct involving "manipulation" and "deception."

The New York Court of Appeals responded to the certification by holding that there is no private cause of action under the anti-fraud provision of the Martin Act and that the six year statute of limitations governs the Delaware breach of fiduciary duty common law claim. *Loengard v. Santa Fe Industries, Inc.*, 70 N.Y.2d 262 (1987). After the New York Court of Appeals' decision, petitioners moved for summary judgment in the Second Circuit urging the court to follow its recent reaffirmation of fraud in its certification order. In response thereto, the Second Circuit astonishingly stated that respondents "committed no breach of fiduciary duty" under Delaware law and affirmed the judgment below (3a). That decision is the subject of this petition.

The court below held that "Delaware law provides the plaintiffs with no remedy," and that the "defendants committed no breach of fiduciary duty under Delaware law" (2a-3a). If that statement of Delaware law is correct, then Delaware law unconstitutionally authorizes the taking of private property without just compensation. If that statement is incorrect, then the Second Circuit applied Delaware law in a manner inconsistent with the way the Delaware courts would in violation of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In either case, the decision below *must* be reversed.

REASONS FOR GRANTING THE PETITION

I. Delaware Law Governing the Treatment of Minority Shareholders in a Short-Form Merger Constitutes a Taking of Property Without Just Compensation in Violation of the Fifth and Fourteenth Amendments.

The Second Circuit's interpretation of Delaware law has resulted in a blatant violation of the Fifth and Fourteenth Amendments by authorizing the taking of property without just compensation. A series of recent decisions by this Court compels the conclusion that the prohibition of the Fifth Amendment extends to the circumstances of this case.

The Fifth Amendment prohibition extends equally to a direct taking by the government as to an *authorization* by the government for a private party to do the taking. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *see also Nollan v. California Coastal Commission*, 197 S.Ct. 3141 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). A taking occurs when the property is seized for the benefit of a private party. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1242-43 (1987).

Moreover, the requirement that just compensation be provided is as unsatisfied when a grossly undervalued payment is made as if no payment were made. Logically, payment of $150 per share as originally offered, or $254 per share as awarded to other minority shareholders in the appraisal proceeding, *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 138-140 (Del. 1980), for stock worth at least $456 per share is as much a violation as no payment because surely the amount paid is not just compensation.

Thus, Delaware effectively authorizes majority shareholders to seize a well-recognized property interest belonging to minority shareholders—in this case, the petitioners' interest in the assets of Kirby. And while Delaware requires some payment by the majority, the payment required is either the amount that the majority unilaterally chooses to pay or the amount set by an appraisal proceeding that grossly undervalues the minority's interest. Accordingly, petitioners have been subjected to an unconstitutional taking.

a. The Interest Seized From the Petitioners Constitutes "Property" Within the Meaning of the Takings Clause.

Beyond all doubt, the petitioners' property interest in the stock of Kirby and the underlying assets of timberlands is precisely the type of property protected by the Fifth Amendment. *See e.g., Pennsylvania Coal Co. v. Mahon, supra.* This protection has been extended to intangibles. *Lynch v. United States,* 292 U.S. 571, 579 (1934) (contract rights); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984) (trade secrets); *Armstrong v. United States,* 364 U.S. 40 (1960) (materialman's liens); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 596-602 (1935) (real estate liens). *See also Connolly v. Pension Benefit Guaranty Corp.*, 475

U.S. 211, 224 (1986); *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (suggesting that "compel[ling] the surrender" of personal property can constitute a taking); *Hodel v. Irving*, 107 S.Ct. 2076 (1987) (abrogation of the right to dispose of property at death is a taking).

Significantly, Kirby's assets appear to have consisted primarily of forested land. *Bell.* As stockholders in Kirby, petitioners had a pro rata interest in that land and in the resources on it. In an important sense, Delaware permitted the respondents to seize petitioners' property interests in this land and timber. Such interests are at the core of the property protected by the takings clause. *See, e.g., Pennsylvania Coal Co. v. Mahon, supra.*

b. Delaware Law Authorizes the Seizure of Minority Shareholders' Property Interests Without Adequate Compensation.

Majority shareholders, by executing a short-form merger, can force the minority to choose between two alternatives: accepting the price offered by the majority, or invoking the appraisal remedy. The first alternative obviously does not provide adequate compensation. The holding of the court below is that Delaware imposes no fiduciary duty on the majority to offer the minority a price that in any way reflects the value of the shares. In this case the price offered by the majority severely understated the value of the shares. In general, because it has no fiduciary duty to offer a fair price, the majority can appropriate the shares at whatever price it chooses. That is plainly not just compensation.

The second alternative—the appraisal remedy—is inadequate, because it authorizes the appraiser (or the court) to establish share price below the asset value of the shares. "It is generally agreed that [appraisal statutes] provide an unrealistic remedy," *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283, 1297 n.4 (2d Cir. 1976)

(Mansfield, J., concurring).[2] Indeed, share prices are routinely set at a value below asset value, as they were in this case. When share prices are set below asset values, the minority is directly deprived of property rights.

A share of stock is a valuable property interest because it is a right in the assets of a corporation. In this case, the asset value of Kirby was $456 per share. Kirby's assets were principally timber and a ready market for it existed. *See Bell.* Here, asset value means that the assets (net of liabilities) could be sold in an arms length sale to a third party for $456 per share. That is equivalent to cash in the bank of $456 per share. By using a weighted average approach—of earnings value and asset value—the Delaware court fixed an appraisal value of $254.40 per Kirby share instead of its full cash value of $456 per share. *Bell.*

Petitioners' stock was therefore worth at least $456 per share to them. It was also worth at least that much to the majority when it expropriated the stock. But the petitioners were paid only $150 per share; the value set by the appraisal proceeding was only $254.40 per share. The difference in price between these amounts and $456 was simply appropriated from the minority shareholders. According to the Second Circuit, Delaware authorized the respondents to appropriate it. That action by Delaware constituted a taking without just compensation.[3]

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[2] *See also* Brudney & Chirelstein, Fair Shares In Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 306 (1974) ("our view is that the individual right of appraisal is not directly responsive to the problem of fiduciary abuse in mergers between parents and subsidiaries. . .").

[3] Petitioners implicitly raised the takings argument in their motion for summary judgment in the Second Circuit. Petitioners vigorously argued that the fraud involved the taking of property at a substantially undervalued price and that the forced purchase price did not reflect fair compensation. Brief in support of motion for summary judgment dated September 22, 1987.

II. Alternatively, the Decision Below Violates the Doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and Results in a Denial of Due Process of Law as the Second Circuit Ignored Its Own Previous Findings of Fraud.

It is well-settled Delaware law that where majority shareholders commit a fraud on the minority, they are liable for a breach of fiduciary duty. *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099 (Del. 1985). Where a fiduciary is guilty of fraud or gross and palpable overreaching, *Weinberger*, and unfair dealing or procedural unfairness, *Rabkin*, it is liable for breach of fiduciary duty. Yet, in an incredible and arbitrary decision, the Second Circuit abandoned *its own two* previous statements that the transaction at issue operated as a fraud on the minority (4a-5a) and denied relief under Delaware law (1a-3a). The conclusion is compelling that a Delaware court would not have denied relief for breach of fiduciary duty.[4] Thus, the decision of the Second Circuit in this diversity case cannot be permitted to stand.[5]

There can be no denial that the Second Circuit *twice* concluded that the transaction at issue operated as a

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[4] Alternatively, the grandfather clause in *Weinberger v. UOP* explicitly afforded litigants the right to challenge the element of fair value in "any case" on appeal to the Delaware Supreme Court, or "any case" then pending in the Court of Chancery, or "any case" challenging a cash-out merger on or before February 1, 1983. The *Loengard* case clearly fit within the unqualified language of *Weinberger* and thus these shareholders were entitled to relief under its provisions. The Second Circuit also ignored this argument which would have provided plaintiffs with relief.

[5] This Court has recently identified fraud in *Carpenter v. United States*, 98 L.Ed.2d 275, 284 (1987) as:

> " 'wrongdoing one in his property rights by dishonest methods or schemes', and 'usually signify the deprivation of something or value by trick, deceit, chicane or overreaching.' " The concept of "fraud" includes the act of embezzlement, which is " 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.' " (citations omitted).

fraud on the minority shareholders. First, in *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283, 1290 (2d Cir. 1976), the court explicitly held that the conduct at issue was "cognizable as 'an act, practice or course of business which operates or would operate as a fraud.'" Second, in its January 28, 1987 order certifying two questions to the New York Court of Appeals, the Second Circuit reiterated this finding and *held* that "[t]his aspect of our opinion in *Green* was not affected by the decision of the United States Supreme Court, 430 U.S. 462 (1977) which reversed *Green* on the basis that 'fraud' was not covered by section 10(b) of the Securities Exchange Act of 1934." (6a). Significantly, *the Second Circuit itself recognized that its conclusion of fraud was unaffected by the legal theory under which the issue was being considered.* The Second Circuit rightfully held that its conclusion of fraud was left intact despite the fact that the Supreme Court rejected its legal theory that the fraud was actionable under federal law because Section 10(b) of the Securities Exchange Act only contains language prohibiting deception or manipulation.

Yet, in an amazing reversal of position, and a surprise to petitioners, the Second Circuit failed to apply this logic to the common law claim for breach of fiduciary duty under Delaware law. The finding of fraud which survived rejection of the federal 10(b) claim had to have survived rejection of the New York Martin Act claim, and should have informed analysis of the Delaware claim. Just as the Second Circuit recognized that the shift in legal theory from the federal 10(b) to the New York Martin Act did not affect the finding of fraud, the shift to Delaware common law *should* not have affected the finding.[6]

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[6] Although the court accused petitioners of a disingenuous reading of its certification order by relying on fraud discussed in the context of the Martin Act claim, petitioners did precisely what the court itself did.

Were a Delaware court faced with these facts, it would undoubtedly have concluded that there was a breach of fiduciary duty. *Weinberger v. UOP Inc.*, *supra*, and *Rabkin v. Philip A. Hunt Chemical Corp.*, *supra*, compel this conclusion. Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court should now rectify this disparity between the federal diversity court and the state court.

III. The Decision Below Produces the Manifestly Unjust Result that Minority Shareholders Who Are Defrauded by Majority Shareholders Are Left With *No Remedy* Under State or Federal Law.

This case starkly demonstrates an egregious gap in the laws aimed at protecting the property of corporate shareholders. In *Santa Fe Industries Inc. v. Green*, 430 U.S. 462 (1977), this Court, without disturbing the finding of fraud by the Second Circuit, held that such fraud was not cognizable under Sec. 10(b) of the Securities Exchange Act of 1934 and relegated petitioners to their state law remedies. In *CPC Int'l v. McKesson Corp.*, 70 N.Y.2d 268 (1987) and in *Green & Borg v. Santa Fe Industries, Inc.*, 70 N.Y.2d 244 (1987), the New York Court of Appeals held that there was no private cause of action for fraud under the Martin Act, New York's securities law. Finally, by the Order from which this petition arises, the Second Circuit held that, despite its own prior recognition of the fraud in the transaction (6a), Delaware law affords no relief to petitioners who were forced out at $150 per share where the asset value was judicially determined to be $456 per share (1a-3a).

The end result is the intolerable situation that shareholders who are victimized by fraud are left without remedy. A corporate looter is fully shielded where he engages in fraud but avoids deception (which would be actionable under the federal securities law). *See Santa Fe Industries, Inc. v. Green*, *supra*. This Court, as the

court of last resort for protecting shareholders, cannot permit such an abomination to stand.

Given that this Court has refused to extend federal securities law to cover this abuse of the minority on the assumption that state remedies were available, the Court should now rectify the situation where petitioners have proven that state remedies are totally unavailable, and an egregious deprivation of property without just compensation has resulted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY BENDER
JANINE L. BENDER
SYMA S. LEVINE
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-1250
Attorneys for Petitioners

March 10, 1988

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelveth day of November, one thousand nine hundred and eighty-seven.

Present:

HON. JAMES L. OAKES,
HON. RICHARD J. CARDAMONE,
HON. RALPH K. WINTER,
Circuit Judges.

86-7682

RICHARD O. LOENGARD, JR., *et al.*,
Appellants,

v.

SANTA FE INDUSTRIES, INC., *et al.*,
Appellees.

[Filed Nov. 12, 1987]

ORDER

In what we hope will be a final chapter in this multi-volume litigation, plaintiffs Loengard and others have moved for summary judgment against defendants Santa

Fe Industries and Kirby Lumber Corporation for breach of duty under Delaware law, arising out of a "cash-out merger" between Kirby and Forest Industries, a wholly-owned subsidiary of Santa Fe. The motion is pursuant to an appeal of two judgments of the United States District Court for the Southern District of New York, Kevin T. Duffy, Judge, which dismissed the common law claims as time-barred, *Loengard v. Santa Fe Industries*, 573 F. Supp. 1355, 1359-60 (S.D.N.Y. 1983), and which held that the plaintiffs had no claim under New York's Martin Act, N.Y. Gen. Bus. Law § 339-a (McKinney 1968) and § 352-c (McKinney 1984). *Loengard v. Santa Fe Industries, Inc.*, 639 F. Supp. 673 (S.D.N.Y. 1986).

By order of January 28, 1987, we certified two questions of law to the New York State Court of Appeals: one, whether there is a private cause of action under New York's Martin Act, and, two, whether the statute of limitations to be applied to the plaintiffs' Delaware fiduciary duty claims was the three-year statute for injury to property, N.Y. Civ. Prac. Law § 214(4) (McKinney 1972) or the six-year statute of limitations for actions seeking equitable relief. N.Y. Civ. Prac. Law § 213(1) (McKinney 1972). The Court of Appeals responded to our questions by holding that there is no private cause of action under the anti-fraud provisions of the Martin Act, *CPC Int'l v. McKesson Corp.*, —— N.Y.2d ——, No. 194 (Sept. 15, 1987), and that the six-year statute of limitations governs the common law claims. *Loengard v. Santa Fe Industries*, No. 193 (Sept. 15, 1987). On the basis of this answer we affirm the district court's judgment on the Martin Act claim. However, because the plaintiffs' Delaware law claim was filed less than six years after the statute was triggered, it is not time-barred. Nonetheless, because we believe that Delaware law provides the plaintiffs with no remedy, the motion for summary judgment is denied, and the judgment dismissing the claim affirmed, albeit on other grounds.

In support of his motion Loengard claims that our January 28 order held that the defendants' acts were fraudulent and that the defendants are collaterally estopped from challenging the value of the assets and stock in question. *See* Appellants' Brief in Support of Motion at 2. This is an incorrect and disingenuous reading of that order. Plaintiffs rely on language which discusses only the Martin Act claim; in fact, the text of the order does not address the Delaware law claim at all. As such, the order affords the plaintiffs no support.

Courts which have considered the identical substantive claims, underlying acts, and factual and legal issues as we consider in this motion and which the district court considered below have held that Delaware law affords the plaintiffs no relief. *Green v. Santa Fe Industries*, 576 F. Supp. 296 (S.D.N.Y. 1983), *aff'd without opinion*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984); *Green & Borg v. Santa Fe Industries*, —— N.Y.2d ——, No. 192 (New York State Court of Appeals, Sept. 15, 1987). While we are not bound to follow these opinions, we are persuaded by them that the defendants committed no breach of fiduciary duty under Delaware law.

Motion denied; judgments affirmed.

/s/ James L. Oakes
JAMES L. OAKES

/s/ Richard J. Cardamone
RICHARD J. CARDAMONE

/s/ Ralph K. Winter
RALPH K. WINTER
Circuit Judges

CORRECTED ORDER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of January, one thousand nine hundred and eighty-seven.

Present:

HON. JAMES L. OAKES,
HON. RICHARD J. CARDAMONE,
HON. RALPH K. WINTER,
Circuit Judges.

86-7682

RICHARD O. LOENGARD, JR., JOHN BORG LOENGARD and URSULA L. BERENS, individually and as Executors of the ESTATE of MARGERY BORG LOENGARD, Deceased; THE BANK OF NEW YORK, Trustee of the Trust for the Benefit of DOROTHY BORG under the Will of SIDNEY C. BORG, Deceased; FRANCES M. BORG, DONALD C. BORG and WILLIAM FURTH as Executors of the ESTATE OF JOHN S. BORG, Deceased; and SYLVIA T. YARROW,
Appellants,

v.

SANTA FE INDUSTRIES, INC.,
SANTA FE NATURAL RESOURCES, INC., and
KIRBY LUMBER CORPORATION,
Appellees.

[Filed Jan. 28, 1987]

ORDER

The appeal in this diversity case is from a judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, Judge, granting summary judgment in favor of defendant Santa Fe Industries, Inc., and its subsidiaries and dismissing the complaint of the plaintiffs, a group of former stockholders in Kirby Lumber Corporation ("Kirby"), a Santa Fe subsidiary, who were "cashed out" in a Delaware short-form merger. *Loengard v. Santa Fe Industries, Inc.*, 639 F. Supp. 673 (S.D.N.Y. 1986). In an earlier opinion in this case, the district court found that the plaintiffs' claim under New York's Martin Act, N.Y. Gen. Bus. Law § 339-a (McKinney 1968) and § 352-c (McKinney 1984), was timely because the applicable six-year statute of limitations, N.Y. Civ. Prac. Law § 213(1) (McKinney Supp. 1987), had been duly tolled from the filing of a class action complaint on September 10, 1974, until the denial of class action status on June 7, 1979. *Loengard v. Santa Fe Industries, Inc.*, 573 F. Supp. 1355 (S.D.N.Y. 1983). The court went on to hold, however, 639 F. Supp. at 676, that no claim was stated under the Martin Act because there was no "fraudulent conduct" on the part of the defendants in connection with the merger even though the cash-out offer accepted by the plaintiffs was $150 per share and a subsequent appraisal proceeding in Delaware determined Kirby's asset value to be $456 per share and the fair market value of each Kirby share to be $254.40, *see Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 139-40 (Del. 1980). The district court so found despite the fact that the Martin Act speaks in terms of "fraud" and "deception, concealment, suppression . . . ," N.Y. Gen. Bus. Law § 352-c, and despite this court's holding in *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283, 1290 (2d Cir. 1976), that the conduct at issue in this case was "cognizable as 'an act, practice or course of business which operates or would

operate as a fraud.'" This aspect of our opinion in *Green* was not affected by the decision of the United States Supreme Court, 430 U.S. 462 (1977), which reversed *Green* on the basis that "fraud" was not covered by section 10(b) of the Securities Exchange Act of 1934, that section reaching only conduct involving "manipulation" and "deception."

We recognize that the Appellate Division, First Department, has held that there is no private right of action under the Martin Act. *CPC International, Inc. v. McKesson Corp.*, 507 N.Y.S.2d 984 (App. Div. 1986), *motion for leave to appeal filed* (Ct. App. Dec. 2, 1986). We note, however, that the New York Court of Appeals has granted leave to appeal a decision adverse to plaintiffs in a separate state action also captioned *Green v. Santa Fe Industries, Inc.*, No. 23203-84 (N.Y. Sup. Ct. Apr. 29, 1985), *aff'd*, 118 App. Div. 2d 1054, 499 N.Y.S.2d 567, *leave to appeal granted*, Mot. No. 1022 (Ct. App. Nov. 18, 1986). That case arises out of the very same short-form merger attacked here, and on identical facts presents the very same questions as to the applicable statute of limitations and the scope of the Martin Act. Recognizing that the New York Court of Appeals may decide *Green* on grounds of res judicata or collateral estoppel, we nevertheless certify two questions of New York law, not controlled by precedent in the New York Court of Appeals, by directing our Clerk of Court under the official seal of this court, all in conformity with the New York Rules of Court § 500.17 (McKinney 1986), to file with the Clerk of that court the following certificate:

Certificate to the New York Court of Appeals from the United States Court of Appeals for the Second Circuit Pursuant to New York Rules of Court § 500.17

RICHARD D. LOENGARD, JR., *et al.*,

v.

SANTA FE INDUSTRIES, INC., *et al.*

1. *Statement of Facts*

Plaintiff New York residents were stockholders in Kirby Lumber Corporation ("Kirby"), a Delaware corporation controlled by defendant Santa Fe Industries, Inc., and by the latter's wholly-owned subsidiary, defendant Santa Fe Natural Resources, Inc. (together "Sante Fe"). Santa Fe Natural Resources, Inc., owned 95% of Kirby's stock. To freeze out plaintiffs and other minority shareholders of Kirby, Santa Fe organized Forest Products, Inc ("Forest") another wholly-owned subsidiary, and in a short-form merger under Del. Code Ann. tit. 8, § 253 (1983), merged Forest into Kirby on July 31, 1974. The next day minority shareholders were informed of their right either to receive $150 cash per share or to seek an appraisal under Delaware law. Plaintiffs accepted the $150. Other stockholders who sought an appraisal received an appraised value of $254.40 (plus prejudgment interest). *See Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 139-40 (Del. 1980). Unsuccessful efforts were made by and on behalf of plaintiffs herein to be included in a class action in *Green v. Santa Fe Industries, Inc.*, 391 F. Supp. 849 (S.D.N.Y. 1975), *aff'd in part and rev'd in part*, 533 F.2d 1283 (2d Cir. 1976), *rev'd*, 430 U.S. 462 (1977), *on remand*, *Green v. Santa Fe Industries, Inc.*, 562 F.2d 4 (2d Cir. 1977), 82 F.R.D. 688 (S.D.N.Y. 1979), 88 F.R.D. 575 (S.D.N.Y. 1980), 576 F. Supp. 269 (S.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1434 (2d Cir.), *cert. denied*, 469 U.S. 917 (1984). On November 29, 1982, plaintiffs filed

this diversity action in federal court, alleging fraudulent conduct under the Martin Act, N.Y. Gen. Bus. Law § 339-a (McKinney 1968) and § 352(c) (McKinney 1984), and breach of fiduciary duty. This suit was brought within six but not within three years of the merger date, July 31, 1974, after taking into account the tolling of the statute of limitations from September 10, 1974 (when the *Green* case was brought) until June 7, 1979 (when class action status was denied). The district court found the breach of fiduciary duty action to be governed by a three-year statute of limitations, N.Y. Civ. Prac. Law § 214(4) (McKinney Supp. 1987), and hence time-barred. It found the Martin Act claim to be governed by a six-year limitations period, N.Y. Civ. Prac. Law § 213(1) (McKinney Supp. 1987), and hence timely. *Loengard v. Santa Fe Industries, Inc.*, 575 F. Supp. 1355 (S.D.N.Y. 1983). The district court later found, however, that no Martin Act claim was stated. *Loengard v. Santa Fe Industries, Inc.*, 639 F. Supp. 673 (S.D.N.Y. 1986).

2. *Questions of New York Law*

There are two questions of New York law, not controlled by precedent of the New York Court of Appeals, that may be determinative of the issues in this case.

> 1. Where defendant fiduciaries in a Delaware short-form "cash-out" merger unilaterally fix a value of and pay to minority stockholders $150 per share, where the defendants are collaterally estopped from challenging the determination in *Bell v. Kirby Lumber Corp.*, 413 A.2d 137 (Del. 1980) that the asset value was $456 per share and the fair value of the shares was $254.40 per share, and where material acts were done in New York State in furtherance of the merger, was actionable fraud committed under New York's Martin Act (N.Y. Gen. Bus. Law § 352-c)?

2. Whether New York State's six-year statute of limitations (N.Y. Civ. Prac. Law § 213(1) or (2)) governs a claim for unjust enrichment from a breach of fiduciary obligation, arising out of a freeze-out merger transaction where the majority fiduciary forcibly purchases the minority's shares at a unilaterally determined and substantially undervalued price without prior notice?

3. *Statement as to Why These Issues Should Be Addressed by the Court of Appeals At This Time*

The following are the reasons these questions should be addressed at this time:

1. The New York Court of Appeals has granted leave to appeal in *Green v. Santa Fe Industries, Inc.*, No. 23203-84 (N.Y. Sup. Ct. Apr. 29, 1985), *aff'd*, 118 App. Div. 2d 1054, 499 N.Y.S.2d 567, *leave to appeal granted*, Mot. No. 1022 (Ct. App. Nov. 18, 1986), a case involving the same or some of the same issues arising out of the very same short-form freeze-out merger involved herein;

2. The issues are important and in all likelihood determinative of the instant case and other cases like it.

Dated at New York, New York, this 28th day of January, 1987.

/s/ Elaine R. Jacobson
Clerk of the United States
Court of Appeals for the
Second Circuit

[SEAL]

The Clerk is also directed to transmit copies of the briefs and joint appendix in our court to the Clerk of the New York Court of Appeals as well as, upon request, any part or all of the case record(s) contained in our

court pertaining to this case or to the federal court proceedings in *Green v. Santa Fe Industries, Inc., supra.*

/s/ James L. Oakes
JAMES L. OAKES

/s/ Richard J. Cardamone
RICHARD J. CARDAMONE

/s/ Ralph K. Winter
RALPH K. WINTER
Circuit Judges

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported cited, or otherwise used in unrelated cases before this court or any other court.*

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 82 Civ. 7919 (KTD)

RICHARD O. LOENGARD, JR., *et al.*,
Plaintiffs,

v.

SANTA FE INDUSTRIES, INC., *et al.*,
Defendants.

July 9, 1986

As Amended Sept. 12, 1986

MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, District Judge:

Plaintiffs bring this action pursuant to New York's Martin Act, Gen. Bus. Law § 352-c (McKinney 1984). Plaintiffs are minority shareholders who were "cashed out" pursuant to a 1974 short-form merger between Kirby Lumber Corporation ("Kirby") and Santa Fe Natural Resources, Inc. ("Resources"). The defendants are Kirby Forest Products, Inc. (formerly known as Kirby Lumber Corporation), Santa Fe Industries, Inc. ("Santa Fe"), and Resources. Jurisdiction is based on diversity of citizenship.[1] 28 U.S.C. § 1332.

Plaintiffs move for summary judgment, pursuant to Fed. R. Civ. P. 56, or alternatively, for partial summary judgment on the issue of defendants' liability and for a

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[1] Plaintiffs are New York residents and each defendant is a Delaware corporation.

separate trial to determine damages. Defendants cross-move for summary judgment alleging plaintiffs have failed to state a claim under the Martin Act. Defendants further request the imposition of sanctions pursuant to Fed. R. Civ. P. 11. For the following reasons plaintiffs' motions are denied and defendants' motion for summary judgment is granted. Defendants' request for sanctions, however, is denied.

FACTS

The merger in this case has now been litigated for eleven years. Although familiarity with previous decisions concerning this merger is assumed,[2] some background facts, stated as briefly as possible, are nevertheless required. On July 11, 1974, Forest Industries, Inc., a wholly-owned subsidiary of Resources, was created for the purposes of the merger. At the time, Kirby was a 95 percent subsidiary of Santa Fe. Resources was, and is, a wholly-owned subsidiary of Santa Fe. On July 31, 1974, Santa Fe completed a short-form merger between Forest Industries, Inc. and Kirby pursuant to Del. Code Ann. Tit. 8, § 253 (1983). As a result of the merger, Resources acquired the 5 percent interest in Kirby not previously owned by Santa Fe.

After the merger and pursuant to Delaware's short-form merger statute, Kirby's minority shareholders were given notice of their right to "cash out" at $150 per share, or to elect a judicial appraisal hearing. Under Delaware law, the exclusive remedy for minority shareholders who dispute the fair value of their shares is to seek a judicial appraisal. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983).

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[2] The previous decisions are: *Green v. Santa Fe Industries, Inc.*, 391 F.Supp. 849 (S.D.N.Y.1975); *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1283 (2d Cir.1976); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977); *Bell v. Kirby Lumber Corp.*, 413 A.2d 137 (Del.1980); *Green v. Santa Fe Industries, Inc.*, 88 F.R.D. 575 (S.D.N.Y.1980); *Loengard v. Santa Fe Industries, Inc.*, 573 F.Supp. 1355 (S.D.N.Y.1983); and *Green v. Santa Fe Industries, Inc.*, 576 F.Supp. 269 (1983).

The notification sent to Kirby's minority shareholders contained information about Kirby's business condition and the estimated value of its assets. An appraisal by Morgan Stanley & Company, Inc., estimating the earnings value of the Kirby stock at $120 per share was also included in the notice.

Plaintiffs accepted Resources' offer to pay $150 per share while other minority shareholders elected an appraisal. In the appraisal proceeding, Kirby's asset value was determined to be $456 per share and the fair market value of the shares was found to be $254.40. *Bell v. Kirby Lumber*, 418 A.2d 187, 189 (Del. 1980). Plaintiffs were also awarded $99.57 per share in prejudgment interest.

DISCUSSION

Plaintiffs claim the method used to cash them out, although done in accordance with the Delaware short-form merger statute, operated as a fraud against them because: (1) there was no legitimate business purpose for the merger; (2) the minority shareholders were not given prior notice of it; and (3) their shares were greatly undervalued. Regarding the latter point, plaintiffs claim that defendants are collaterally estopped from challenging either the fact of the undervaluation of the value of the shares determined by the appraiser and upheld in *Bell*. Even assuming plaintiffs' collateral estoppel argument is correct, that fact alone would not be determinative of the defendants' liability under the Martin Act.

Martin Act

Plaintiffs argue that the Martin Act prohibits a broader range of conduct than 15 U.S.C. § 78j(b) and Securities & Exchange Commission ("SEC") Rule 10b-5. The same short-form merger challenged here was previously found not to violate Rule 10b-5, because the merger involved no deception or manipulation. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 474, 97 S.Ct. 1292, 1301, 51 L.Ed.2d 480 (1977).

The Martin Act prohibits the following conduct in a variety of securities transactions:

> 1. It shall be illegal and prohibited for any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any of the following acts or practices:
>
> (a) Any fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale; . . . .

N.Y. Gen. Bus. Law § 352-c.

Plaintiffs essentially argue that, because the Martin Act separately lists both fraud and deception, it prohibits conduct which is not deceptive but which is nevertheless fraudulent. Plaintiffs further assert that Delaware's short-form merger procedures fall into this category.

Plaintiffs correctly argue that the Martin Act is to be interpreted broadly to best effectuate the purposes of the Act. *People v. Federated Radio*, 244 N.Y. 33, 38-40, 154 N.E. 655 (1926). That broad interpretation, however, is not a license to include within the ambit of its prohibitions conduct which is not fraudulent and was never intended to fall within the Act's coverage.

Fraud is defined as a false representation or omission "which deceives and is intended to deceive another so that he shall act upon it to his legal injury." Black's Law Dictionary (4th ed. 1968). Although intent to deceive is not required under the Martin Act, some "tendency to deceive" is necessarily included within the plain meaning of fraud. It is axiomatic that when undertaking statutory interpretation a word should be given its plain and ordinary meaning. Although plaintiffs would argue the contrary, courts interpreting the Martin Act have not failed to adhere to this principle. Fraud, under the Martin Act, has consistently been interpreted as conduct with a "tendency" to receive or mislead.

In *People v. Lexington Sixty-first Associates.*, 38 N.Y.2d 588, 381 N.Y.S.2d 836, 840, 345 N.E.2d 307 (1976), the New York Court of Appeals held that the Martin Act prohibited "deceitful practices". In that case the owners of a rent stabilized building leased apartments to phony tenants who never actually lived there. The owners then claimed these "tenants" were among the required 35 percent who agreed to purchase their apartments under a co-operative conversion scheme, and included this information in a public offering. The defendants' conduct was not only deceptive, it was illegal. The Court of Appeals stated:

> The purpose of the [Martin Act] is to prevent all kinds of fraud in connection with the sale of securities and commodities and to defeat all related schemes whereby the public is exploited, the terms "fraud" and "fraudulent practices" to be given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty, including all acts, even though not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead the purchasing public.

Lexington 318 N.Y.S.2d at 840, 345 N.E.2d 307 (citations omitted).

In *Bishop v. Commodity Exchange, Inc.*, 564 F. Supp. 1557, 1565 (S.D.N.Y. 1988), another case cited by plaintiffs, the court held that the abuse of the Commodity Exchange's rulemaking power for the purposes of market manipulation would be a "decitful practice" prohibited by the Martin Act.

The Loengards rely heavily on *People v. Concord Fabrics, Inc.*, 83 Misc.2d 120, 371 N.Y.S.2d 550 (Sup. Ct. N.Y.), *aff'd*, 50 A.D.2d 787, 377 N.Y.S.2d 84 (1975) in support of their argument that the Kirby merger constitutes a fraud. Plaintiffs overlook two important factors, however, which distinguish *Concord* from the instant case. First, there was deception in *Concord* be-

cause a relative of one of the majority shareholders was also the appraiser who determined the value of the minorities' shares and thus, the amount they would be paid pursuant to the merger. *Concord* 83 Misc.2d at 121, 371 N.Y.S.2d 550. Second, it has been held subsequently that *Concord* does not apply to suits brought by private litigants, but only to cases brought by the Attorney General for injunctive relief. *Halle & Steiglitz v. Kolen*, Blue Sky L. Rep. (CCH) ¶ 68,436, ¶ 71,435 (N.Y. Sup. Ct. 1978). For these reasons, *Concord* does not advance the plaintiffs' position.

Plaintiffs have also brought to my attention a recent decision by the Delaware Supreme Court, *Rabkin v. Philip Hunt*, 498 A.2d 1099 (Del. 1985), in which the Court reassessed the exclusivity of the appraisal remedy under Delaware law. In *Rabkin*, the plaintiff minority shareholders argued that the defendant company had fraudulently avoided paying a $25.00 per share price for plaintiffs' shares by misrepresenting its intentions to purchase 100 percent of the target company's shares. The defendant company purchased 63.4 percent of the target company's shares and thereafter contracted to pay $25.00 per share for the rest of its shares, if purchased within the following year. The defendant company had every intention of purchasing the outstanding shares of the target company, however, to avoid paying the $25.00 contract price, it misrepresented its intentions in a press release and timed the purchase so that it did not occur until after the one-year contractual period had elapsed. Under these circumstances, the Delaware Supreme Court held that the dispute did not primarily concern the fair value of the shares, for which an appraisal would be the appropriate remedy, but was in fact an action to enforce a contractual right that was avoided by the defendant's manipulative conduct. Rabkin at 1105. The court held that the plaintiffs had stated a cause of action sufficient to survive a motion to dismiss. The obvious difference between *Rabkin* and the instant case is that *Rabkin* involved deception, whether it be called fraud,

bad faith, overreaching, or manipulation, and the instant case does not.

Plaintiffs try to turn what is essentially a dispute over the valuation of their shares into a dispute over the fairness of the entire transaction by complaining they received no prior notice of the intended merger. As has often been stated, the Delaware short-form merger statute does not require that minority shareholders receive prior notice of the intended merger because to do so would be simply a waste of time. With 95 percent of the shares voting for the merger, the 5 percent minority would have no chance of preventing it. Thus, in such cases, the minority shareholders must seek an appraisal.

In the context of overall fairness, plaintiffs further complain that the merger was a "self-motivated takeover", enriching the majority at the minorities' expense and lacked a proper business purpose. Under Delaware law the desire to go private is sufficient reason for undertaking the merger. In the absence of fraudulent or deceptive conduct, merely concentrating a company's control in the hands of a few is, by itself, an insufficient ground for complaint. *Weinberger* at 715; *Stepak v. Scharffenberger*, No. 85-6530, slip op. at 5 (Del. Ch. Aug. 9, 1985).

The Kirby merger was carried out in strict compliance with Delaware law. The information statement contained the relevant financial data, the appraised value of the shares, and the appraised value of Kirby's assets. In short, there was full disclosure. Moreover, no misrepresentations or material omissions were made. Under the circumstances, there is simply no fraud. Plaintiffs have failed to establish the unfairness of the merger, thus, their sole remedy was to seek an appraisal. *Weinberger* at 714.

Without a showing of some kind of fraudulent conduct, plaintiffs have failed to state a claim under the Martin Act. Thus, as there is no genuine issue for trial

in this case, defendants' motion for summary judgment is granted. Plaintiffs' motions are denied.

Although plaintiffs have failed to establish their claim, I do not find they have acted in bad faith or for dilatory purposes. Thus, defendants' request for sanctions pursuant to Fed. R. Civ. P. 11 is denied.

SO ORDERED.

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 82 Civ. 7919 (KTD)

RICHARD O. LOENGARD, JR., *et al.*,
Plaintiffs,

v.

SANTA FE INDUSTRIES, INC., *et al.*,
Defendants.

Oct. 6, 1983

MEMORANDUM & ORDER

KEVIN THOMAS DUFFY, District Judge:

Defendants, Santa Fe Industries, Inc. ("Santa Fe"), Santa Fe Natural Resources, Inc. ("Resources"), and Kirby Forest Industries, Inc. ("Kirby"), move for summary judgment on the ground that the claims asserted by the plaintiffs, who will be collectively referred to as the Loengard plaintiffs, are barred by the applicable statute of limitations. For the reasons that follow, the defendants' motion for summary judgment is denied in part, and granted in part.

The action instituted by the Loengard plaintiffs arose out of a "cash-out merger" between Kirby and Forest Industries, Inc. ("Forest"), a wholly-owned subsidiary of Resources which had been formed for the purpose of the merger. This merger has prompted a plethora of litigation in both federal and state courts. *See Santa Fe Industries v. Green, Inc.*, 430 U.S. 462, 97 S.Ct. 1292, 51

L.Ed.2d 480 (1977); *Bell v. Kirby Lumber Corp.*, 413 A.2d 137 (Del. 1980). I will assume familiarity with all past opinions issued in the instant case and in the related case of *Santa Fe Industries, Inc. v. Green*, and will only set forth the facts relevant to this motion.

I.

FACTS

On July 31, 1974, a "short form" merger between Kirby and Forest was effected pursuant to section 253 of the Delaware Corporation Law. An information statement was thereafter sent to the minority shareholders of Kirby advising them of their rights. A class action complaint arising out of this merger was filed in *Green v. Santa Fe Industries, Inc.*, 74 Civ. 3915, on September 10, 1974 in this court. The defendants do not dispute that the Loengard plaintiffs would have been included in this class had the action been allowed to continue as a class suit.

After numerous extensions, the plaintiffs in *Green* moved for class certification on February 13, 1979. This motion was denied on June 7, 1979. *Green v. Santa Fe Industries*, 82 F.R.D. 688, 690 (S.D.N.Y. 1979). A second motion for class certification was made by the *Green* plaintiffs on July 7, 1980. This motion was denied on November 7, 1980. *Green v. Santa Fe Industries*, 88 F.R.D. 575, 576 (S.D.N.Y. 1980).

On January 26, 1982, the Loengard plaintiffs filed a motion to intervene in the *Green* action. This motion was denied as untimely on March 22, 1979 and this ruling was affirmed by the Second Circuit on October 29, 1982. The present *Loengard* complaint was filed on November 30, 1982.

The defendants have moved for summary judgment arguing that the applicable statute of limitations has ex-

pired on the two claims asserted by the plaintiffs; the first claim is for breach of fiduciary duty and the second claim arises under the Martin Act. The plaintiffs oppose this motion and argue that the statutes of limitations were suspended from the commencement of the federal action on September 10, 1974 until the denial of the first motion for class certification on June 7, 1979. The plaintiffs contend that with this tolling, only approximately three and one-half years has expired [1] and that both causes of action are governed by a six year statute of limitations. The defendants challenge the plaintiffs' tolling calculations and use of the six-year statutes of limitations.

II.

DISCUSSION

Applicable Statute of Limitations

A. Martin Act Claims

The first cause of action asserted by the plaintiffs is under sections 339-a and 352-c of New York's General Business Law (McKinney Supp.1981-1982), commonly known as the Martin Act. Because the Martin Act provides no statute of limitations period, the New York Civil Practice Law and Rules (CPLR) governs. There are three CPLR sections that may apply to the plaintiffs' Martin Act claim. Section 214(2) provides for a three year period for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute." N.Y. Civ.Prac.Law § 214(2) (McKinney 1972). Section 213 (8), read together with section 203(f), provides that actions based on fraud must be commenced within six years of the alleged fraudulent conduct or within two years

[1] The plaintiffs argue that one month and ten days expired between the complained-of merger and the commencement of the class action and that approximately three years and four months elapsed between the denial of class status and the filing of the Loengard complaint.

after actual or imputed discovery of the facts underlying the claim of fraud. N.Y.Civ.Prac.Law §§ 213(8) & 203(f) (McKinney Supp.1981-1982). Finally section 213(1) prescribes a six-year period for actions with no specified statute of limitations. *Id.* § 213(1).

Relying on *Campito v. McManus, Longe, Brockwehl, Inc.*, 470 F.Supp. 986, 992-93 (N.D.N.Y. 1979), the defendants argue that the three-year period should govern. In determining the proper period to be applied to actions brought under section 10(b) of the Securities and Exchange Act of 1934, the court in *Campito* referred to the statute of limitations of the New York cause of action most similar to the federal claim. The court held that New York's common-law fraud action resembled a section 10(b) claim more closely than a cause of action asserted under the Martin Act. Thus, the six-year statute of limitations applied. In *dicta* the *Campito* court assumed that the three year period provided for in section 214(3) would apply to Martin Act claims.[2]

The plaintiffs, on the other hand, urge that section 213(1) of the CPLR, covering actions with no "specifically prescribed" limitations, should apply to the Martin Act claims. The case relied on by the plaintiffs, *State v. Cortelle Corp.*, 38 N.Y.2d 83, 341 N.E.2d 223, 378 N.Y.S. 2d 654 (1975), did not deal with the statute of limitations under the Martin Act. Nevertheless, the plaintiffs

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[2] The district court in *Campito* reasoned that a Martin Act cause of action was not sufficiently analogous to a section 10(b) and Rule 10b-5 claim to warrant the application of the statute of limitations governing the Martin Act because there did not appear to be a scienter or purchaser-seller requirement under the relevant Martin Act provisions. *Campito v. McManus, Longe, Brockwehl, Inc.*, 470 F.Supp. 986, 992-93 (N.D.N.Y.1979). The *Campito* Court, in a footnote, stated that it was conceivable that New York would read section 352-c to require scienter in which case the six year statute of limitations for fraud causes of action would be applied. 470 F.Supp. at 992, n. 1.

argue persuasively that the reasoning used in *Cortelle Corp.*, an action to enjoin fraudulent practices under section 1101(a)(2) of the New York Business Corporation Law is analogous and mandates the use of the longer "residual" six-year statute of limitations. Because there is no definitive New York case to indicate which CPLR provision would be applied by New York courts to Martin Act claims, I must make an "estimate of what the state's highest court would rule to be its law." *Cunninghame v. Equitable Life Assurance Society*, 652 F.2d 306, 308 (2d Cir. 1981).

CPLR § 214(2) prescribes a three-year period for action to "recover upon liability, penalty, or forfeiture created or imposed by statute." N.Y.Civ.Prac.Law § 214(2) (McKinney 1972).[3]

The liability is one created by statute and thus covered by CPLR 214(2) only if it did not exist at common law or one which "would not exist but for the statute." *State v. Cortelle Corp.*, 38 N.Y.2d 83, 341 N.E.2d 223, 378 N.Y.S.2d 654 (1975). Further, where a statute merely provides a remedy for a preexisting liability, section 214(2) does not apply. *See Id.*; *State Farm Mut. Auto. Ins. Co. v. Regional Transit Serv., Inc.*, 79 A.D.2d 858,

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[3] CPLR § 214(2) was partially derived from the Civil Practice Act (CPA) (precedessor to the CPLR) § 48(2). Under the CPA, however, a liability created by statute was covered by a six-year statute of limitations. Thus, conflict under the CPA usually arose when a plaintiff with a time-barred negligence claim sought to assert it instead under CPA § 48(2).

When the CPLR replaced the CPA, § 214(2) changed the statute of limitations to three years thereby eliminating those cases in which negligence claims were argued to be "created by statute." *See* 1 J. Weinstein, H. Korn, A. Miller, New York Practice ¶ 214.04 (1977).

In the instant case, the defendants are arguing that the plaintiffs' action under the Martin Act derives from a statutorily created liability and not on common law fraud because the latter has a longer limitations period.

434 N.Y.S.2d 486, 487 (4th Dep't) 1980); *see also Hornblower & Weeks-Hemphill, Noyes v. Burchfield*, 366 F. Supp. 1364, 1367 (S.D.N.Y. 1973) (margin violations under securities laws were unknown at common law). *But see Pauk v. Board of Trustees*, 654 F.2d 856, 861 (2d Cir. 1981) (action under 42 U.S.C. § 1983, although not unknown prior to statute, governed by CPLR § 214 (2)), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Staples v. Avis Rent-A-Car System, Inc.*, 537 F.Supp. 1215, 1218 (W.D.N.Y. 1982).

In *Cortelle Corp.*, the Attorney General brought an action pursuant to the New York Business Corporation Law concerning alleged fraudulent practices. The Court of Appeals of New York held that none of the causes of action were governed by the three year statute of limitations in CPLR 214(2) because the Business Corporation Law and Executive Law did not "'make' unlawful" the fraudulent practices but only provided standing to the Attorney General and provided remedies for the wrongs. 38 N.Y.2d at 85, 341 N.E.2d at 224, 378 N.Y. S.2d at 655.

The court stated:

> In sum, analysis of the challenged causes of action reveals that they seek essentially to redress wrongs previously known to the law, long before the enactment of the statutes discussed. These causes of action, therefore, do not depend upon liabilities, penalties or forfeitures created or imposed by statute within the meaning of CPLR 214 (subd. 2).

Id. at 89, 34 N.E.2d at 226-27, 378 N.Y.S.2d at 659. The *Cortelle Corp.* court, therefore, applied the residual six-year statute of limitations in CPLR 213(1) and the action was deemed timely. *Id.*

The plaintiffs' first claim, based on N.Y.Gen.Bus.Law 339-a and § 352-c, alleges that certain of defendants'

acts were fraudulent. Specifically, the Loengard plaintiffs claim that they received no notice prior to the merger and that there were material omissions in the defendants' statement to minority shareholders. Further, the plaintiffs allege that the defendants "as part of their fraudulent scheme obtained and . . . submitted . . . a written statement . . . purporting to value each share of stock . . . at $125 per share even though Morgan [the appraiser] . . . knew that the shares were worth substantially more." Complaint at 4. Thus, the evident basis for plaintiffs' first claim is fraud. Fraud existed at common law and is not a liability created by statute; a six-year statute of limitations therefore should be applied to the Martin Act claims.

B. Breach of Fiduciary Duty Claims

The plaintiffs' second cause of action is for a breach of fiduciary duty. The plaintiffs contend that New York's limitations' period should be applied in the instant action and that the applicable statute of limitations is six years under CPLR § 213(1). The defendants urge that Delaware's three-year period governs this claim, presumably because the defendant corporation is incorporated under the laws of Delaware. For the reasons that follow, I find that New York's statute of limitations is applicable but CPLR § 214(4), which provides for a three-year period for injury to property, applies here and not CPLR § 213(1). Thus, partial summary judgment is granted in favor of the defendants insofar as the breach of fiduciary duty claim is concerned.

Because the jurisdiction of this court is based on diversity of citizenship, the substantive law of New York should be applied. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938). New York's conflict of laws rules as substantive law should be applied in order to determine whether New York's or Delaware's statute of limitations for breach of

fiduciary duty would apply. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941).

New York courts apply New York's statute of limitations to actions brought in New York except if its borrowing statute is triggered. *See Martin v. Julius Dierck Equipment Co.*, 43 N.Y.2d 583, 588, 374 N.E.2d 97, 99, 403 N.Y.S.2d 185, 187 (1978). CPLR 202 provides that actions "accruing without the state cannot be commenced after the expiration of the time limited by law of either the state or the place without the state where the cause of action accrued" except that New York's law will be applied when the cause of action accrues in favor of its residents. N.Y. Civ.Prac.Law § 202 (McKinney 1972). Therefore, because the breach of fiduciary duty claims accrued in favor of New York residents, New York's statute of limitations must be applied.

In New York, actions for damages based on an alleged breach of fiduciary duty appear to be governed by the three-year statute of limitations for injury to property. *See* N.Y.Civ.Prac.Law § 214(4) (McKinney 1972); *Tobias v. Celler*, 37 N.Y.S.2d 399, 402 (Sup.Ct. Kings County 1942), *aff'd*, 265 A.D. 1065, 39 N.Y.S.2d 1020 (2d Dep't 1943); *see Virginia Iron, Coal & Coke Co. v. Brown*, 37 Misc.2d 347, 238 N.Y.S.2d 298, 299 (Sup.Ct. New York County 1962), *aff'd*, 18 A.D.2d 996, 238 N.Y.S.2d 727 (1st Dep't 1963); *cf.*, *Augstein v. Levey*, 3 A.D.2d 595, 162 N.Y.S.2d 269, 272 (1st Dep't 1957), (derivative action for diversion of corporate opportunities is based on waste and is therefore governed by three-year statute of limitations period), *aff'd*, 4 N.Y.2d 791, 149 N.E.2d 528, 173 N.Y.S.2d 27 (1958). Equity actions for an accounting based on a breach of fiduciary duty may not be treated as an action for injury to property under CPLR § 214(4). Instead, these actions are treated as actions with no specific time limitation under CPLR § 213(1) which are governed by a six-year limitations

period. *See Dinerman v. Sutton*, 45 Misc.2d 791, 258 N.Y.S.2d 13, 14-15 (Sup.Ct. Queens County 1965).[4] The instant action is for damages arising from the undervaluation of the shares held by the plaintiffs and is more akin to an injury to property action than an equitable action or an action with its basis in contract. Thus, the three-year statute of limitations provided for in CPLR § 214(4) is applicable to the plaintiffs' breach of fiduciary duty claim.

Plaintiff's action accrued in July of 1974. They assert that their claims are not time barred, however, because of a tolling of the limitations period. Therefore, I now turn to a discussion of tolling.

Tolling of Statute of Limitations

It is well-established that the commencement of a class action tolls the applicable statute of limitations for all members of that class who timely *intervene* in the action until the application for class certification is denied, at least in cases in which the denial is based on a failure to show that the class is so numerous that individual joinder is impracticable. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552, 94 S.Ct. 756, 765, 38 L.Ed.2d 713 (1974), *reh'g denied*, 415 U.S. 952, 94 S.Ct.

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[4] *See also Baratta v. Kozlowski*, 94 A.D.2d 454, 464 N.Y.2d 803 (2d Dep't 1983). In *Baratta*, the president of a bank was the bailee of bonds which he allegedly utilized for his own purposes. The court framed the statute of limitations question as follows:

> Since the action was commenced four and one-half years after its causes of action accrued, we must decide whether it is the *three-year statute of limitations governing* conversion, negligence and *breach of fiduciary duty* or the six-year statute governing contractual and quasi-contractual claims that applies.

Id. at 805 (citations omitted) (emphasis supplied). The court held that the claim had its genesis in a bailment contract and was therefore covered by a six-year statute of limitations.

1477, 39 L.Ed.2d 568 (1974). The rationale behind the Supreme Court's decision in *American Pipe* was the promotion of efficiency and economy of litigation by not requiring potential class members to make motions to intervene before the statute of limitations expires. *Id.* 414 U.S. at 553, 94 S.Ct. at 766.

Recently in *Crown, Cork & Seal Co. v. Parker*, — U.S. —, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) the Supreme Court extended the *American Pipe* rule and held that the commencement of a class action suspends the applicable statute of limitations as to all members of the putative class until class certification is denied permitting such members either to intervene as plaintiffs in the pending action or to file their own action. *Id.* at —, 103 S.Ct. at 2397.[5] The Supreme Court reasoned that "a putative class member who fears that class certification will be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. This result would be a needless multiplicity of actions." *Id.*

In this case, the plaintiff's causes of action accrued on or about July 31, 1974. The filing of a complaint seeking class action status on September 10, 1974 tolled the two-applicable statutes of limitations untill class status was denied on June 7, 1979. Thus, because the plaintiffs had close to six years after June 7, 1979 within which to assert their Martin Act claim, their commencement of this action on November 30, 1982 was timely. On the other hand, even with the operation of the toll, the fiduciary claim was filed several months after the statute of limitations expired.

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[5] The Supreme Court in *Crown, Cork & Seal Co. v. Parker*, —— U.S. ——, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) overruled *Stull v. Bayard*, 561 F.2d 429 (2d Cir.1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 783 (1978) and *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir.1977) in which the Second Circuit limited the scope of *American Pipe* and held that the statute of limitations would be suspended only for the purpose of permitting intervention.

In summary, the plaintiffs' cause of action arising under the Martin Act, N.Y. Gen. Bus. Law §§ 339-a, 352-e (McKinney Supp. 1981-1982) is governed by a six-year statute of limitations; this limitation period was tolled by the filing of the class action complaint on September 10, 1974 until the denial of the class status motion on June 7, 1979. The commencement of the present action on November 30, 1982 is therefore timely as to the Martin Act claim. The breach of trust claim, however, was commenced after the applicable statute of limitation had expired. The defendants therefore are granted summary judgment as to the breach of fiduciary duty.

SO ORDERED.